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IN THE CIRCUIT COURT FOR THE
11TH JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

CIVIL DIVISION

CASE NO. 12-1532 CA 42

STUART BORNSTEIN, on behalf of himself and all others similarly situated,

Plaintiff,

v.

WHIRLPOOL CORPORATION, a Delaware Corporation

MEMORANDUM IN SUPPORT OF JOINT MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

Plaintiff Stuart Bornstein on behalf of himself and as representative of the Settlement Class ("Plaintiff") and Defendant Whirlpool Corporation ("Whirlpool" or "Defendant") have reached a settlement of this proposed class action, for which they seek preliminary Court approval.

A. Background

Plaintiff Stuart Bornstein filed this action in the Circuit Court of Miami-Dade County, captioned *Bornstein v. Whirlpool Corporation*, No. 12-1532-CA-42 ("Lawsuit"), against Whirlpool for breach of warranty and violation of consumer protection statutes based on Defendant's alleged misstatements regarding the horsepower of certain KitchenAid brand Mixers,[1] in connection with the marketing and sale of those machines. More specifically,

[1] Unless otherwise defined herein, all capitalized terms have the meaning ascribed to them in the Settlement Agreement, attached as Exhibit 1. As defined in the Settlement Agreement, "Mixer" and

Plaintiff alleged that Whirlpool's notation of "1.3HP" in its marketing of the Mixers, as well as on the Mixers themselves, was misleading, as these machines do not operate at 1.3 horsepower. Whirlpool appeared and filed its Answer, strenuously denying all of Plaintiff's allegations, and asserting that the motors of the Mixers in fact generated 1.3 horsepower, and that the representations were not therefore misleading.

After this matter was filed and issue was joined, the parties exchanged and evaluated written discovery responses. The parties began settlement discussions after jointly retaining a mediator—Rodney Max, Esq. ("Mediator"), a highly skilled and experienced mediator of complex disputes—to mediate their settlement discussions. The parties met with the Mediator in his Miami office, and began a long course of settlement discussions, including several joint telephone conferences with the Mediator, which culminated in this Settlement.

Following these settlement discussions, the parties, through their counsel, turned to the task of memorializing the terms of the settlement in a Settlement Agreement, along with an accompanying class notice form. On June 4, 2014, the Plaintiff and Whirlpool finalized the Settlement Agreement, attached hereto as Exhibit 1. In accordance with the terms of the Settlement Agreement, the parties jointly move for an order initially approving the Settlement Agreement and conditionally certifying, solely for the purposes of the settlement, the following settlement class:

> . . . each person in the United States and its territories who either (1) purchased a Mixer before entry of the Preliminary Approval Order or (2) received as a gift a Mixer before entry of the Preliminary Approval Order, or (3) acquired possession of a Mixer through other lawful means before entry of the Preliminary Approval Order.

"Mixers" means all 6-qt., 7-qt., and 8-qt. KitchenAid Stand Mixers marketed with a horsepower designation and manufactured and sold by Whirlpool before the entry of the Preliminary Approval Order.

Excluded from the Settlement Class are officers, directors, and employees of Whirlpool and their parents and subsidiaries, as well as judicial officers and employees of the Court. Also excluded from the Settlement Class are Persons who exclude themselves from the Settlement Class in the manner and time prescribed by the Court.

In brief, the Settlement—if finally approved by this Court—would provide significant remediation for the Class. The proposed Settlement extends the manufacturer's limited warranty for two full years with respect to the motors contained in the Mixers. This relief goes to the crux of Plaintiff's theory that the motors contained in the Mixers are less robust than advertised, and guarantees that the risk of any potential lack of robustness in the motor be shifted from consumers to the Defendant. Moreover, through the proposed Settlement, Whirlpool has agreed to change its marketing practices concerning horsepower claims for the Mixers by eliminating horsepower claims that are not accompanied by an explanation of how the horsepower claims were measured and a description of the horsepower output that can be generated in operation. As such, the proposed settlement provides an excellent and eminently fair resolution, to what surely would be a hotly contested litigation if it were to continue. Consumers would receive the full benefits of their bargains with Whirlpool or more, and Whirlpool will change its marketing practices to avoid such issues in the future.

B. <u>Settlement Is In The Best Interest Of The Settlement Class.</u>

Just like its federal counterpart, Federal Rule of Civil Procedure 23(e), Florida Rule of Civil Procedure 1.220(e) requires court approval for any compromises of a class action. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *Chase Manhattan Mortg. Corp. v. Porcher*, 898 So. 2d 153, 156-57 (Fla. 4th DCA 2005) ("Because Florida's class action rule is based on Federal Rule of Civil Procedure 23, Florida courts may generally look to federal cases

as persuasive authority in their interpretation of rule 1.220."). In determining whether to approve the Settlement, the Court should be guided by the strong judicial policy favoring pretrial settlement of complex class action lawsuits. *See, e.g., Maher v. Zapata Corp.*, 714 F.2d 436, 455 (5th Cir. 1983); *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977); *Airline Stewards & Stewardesses Ass'n Local 550 v. Trans World Airlines, Inc.*, 630 F.2d 1164, 1166-67 (7th Cir. 1980) ("Federal Courts look with great favor upon the voluntary resolution of litigation through settlement …"). *See also* David F. Herr, Annotated Manual for Complex Litigation section 21.632 (4th ed. Updated 2011). The policy favoring class settlements has particular force, in part because of the size and complexity of class actions:

> Particularly in class action suits, there is an overriding public interest in favor of settlements …. It is common knowledge that class action suits have a well-deserved reputation as being most complex. The requirement that counsel for the class be experienced attests to the complexity of the class action … In these days of increasing congestion within the federal court system, settlements contribute greatly to the efficient utilization of our scarce judicial resources.

Cotton, 559 F.2d at 1133 (citation omitted). Although class action settlements require court approval, such approval is committed to the sound discretion of the District Court. *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992).

The first step in determining whether to grant preliminary approval to a class settlement is for "the Court [to] make[] a preliminary fairness evaluation of the proposed settlement." *Cope v. Duggins*, No. CIV-A-98-3599, 2001 WL 333102, *1 (E.D. La. April 4, 2001), citing Manual for Complex Litigation (Third) § 30.41 (1995). The Court must "evaluate the likelihood that the Court would approve the settlement during its second review stage, the full fairness hearing." *Id.* In so doing, the Court "will examine the submitted materials and determine whether the

proposed settlement appears fair on its face." *Id.*; *see In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 212 (5th Cir. 1981).

At the preliminary stage, the Court's review is less stringent. *See, e.g., Karvaly v. eBay, Inc.*, 245 F.R.D. 71, 86 (E.D.N.Y. 2007); Manual for Complex Litigation (Fourth), § 21.63 (2004) ("At the stage of preliminary approval, the questions are simpler, and the court is not expected to, and probably should not, engage in analysis as rigorous as is appropriate for final approval"). *See also Fresco v. Auto Data Direct, Inc.*, No. 03-61063-CIV, 2007 WL 2330895 at *4 (S.D. Fla. May 14, 2007); *Newberg*, §11.25, at 38-39 (quoting *Manual for Complex Litigation*, §30.41 (3rd Ed.)); *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1110 (9th Cir. 2008).

The Parties arrived at an agreement in principal with Whirlpool with the benefit of discovery and after extensive arm's length negotiations. This Settlement was subsequently memorialized in the Settlement Agreement attached as Exhibit 1. The Settlement contains the material economic terms of the settlement, the manner and form of notice to be given to the Settlement Class, the contingencies or conditions to the settlement's final approval, and other terms.

Class Counsel possessed adequate information concerning the strengths and weaknesses of the Lawsuit against Whirlpool after extensive formal and informal discovery. In addition, Class Counsel is highly competent counsel with many years of experience litigating class actions. Finally, the complexity, expense, uncertainty, and likely duration of the Lawsuit also militate in favor of consummating the settlement process. Indeed, had this litigation continued, Plaintiffs and the proposed class would face significant uncertainty, both for certification and on the merits, based upon Whirlpool's positions that (a) the motors in the Mixers do meet and exceed the stated horsepower output as evidenced by claims testing completed by both

Whirlpool and its motor supplier, (b) the motors in the Mixers and the Mixers themselves provide a number of additional consumer benefits, resulting in a wide variety of reasons why consumers purchased the Mixers, and (c) the damages claimed are not based upon any objective engineering or economic evidence tied to the alleged misrepresentations. Therefore, all the circumstances support preliminary approval of the Settlement.

C. The Requirements of Rule 1.220 Have Been Satisfied[2] For Conditional Certification of the Settlement Class.

For purposes of conditionally certifying the Rule 1.220(b)(3) class sought by the Parties, the Manual for Complex Litigation (Fourth) § 21.632 advises:

> If the case is presented for both class certification and settlement approval, the certification hearing and preliminary fairness evaluation can usually be combined. The judge should make a preliminary determination that the proposed class satisfies the criteria set out in Rule [1.220](a) and at least one of the subsections of Rule [1.220](b).

This comports with the Supreme Court's holding in *Amchem* that "[s]ettlement is relevant to class certification," but the requirements of Rule 1.220(a) and (b)(3) must still be met. 521 U.S. at 619-20. When the Court is "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems." *Id.*

In this case, all of the requirements for Rule 1.220(a) have been met. Rule 1.220(a) requires that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will

[2] Solely for purposes of preliminary approval of this Settlement, Whirlpool stipulates that the requirements of numerosity, commonality, typicality, adequacy, and predominance are met, and that this Settlement is the superior method for generating customer goodwill and satisfaction and resolving the disputes framed by the pleadings and discovery in this Lawsuit.

fairly and adequately protect the interests of the class. *See Canal Ins. Co. v. Gibraltar Budget Plan, Inc.*, 41 So. 3d 375, 377 (Fla. 4th DCA 2010).

Rule 1.220(b)(3) requires that "the questions of law or fact common to the claim or defense of the representative party and the claim or defense of each member of the class predominate over any question of law or fact affecting only individual members of the class, and class representation is superior to other available methods for the fair and efficient adjudication of the controversy."

Numerosity. No specific number and no precise count are needed to sustain the numerosity requirement. *See Toledo v. Hillsborough Cnty. Hosp. Auth.*, 747 So. 2d 958, 961 (Fla. 2d DCA 1999). *In Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 114 (Fla. 2011), *Sosa* asserted a projected class of at least several hundred, if not thousands, of aggrieved class members which "assuredly satisfies the numerosity requirement." In this case, there are at least thousands of Settlement Class Members. Under these circumstances, the numerosity factor specified in Rule 1.220(a)(1) is satisfied. *See Maner Props, Inc. v. Siksay*, 489 So. 2d 842, 844 (Fla. 4th DCA 1986) (a class consisting of potentially 350 members satisfies numerosity).

Commonality. The commonality requirement of Rule 1.220(a)(2) has been satisfied in this case as the claims of the Plaintiff and the members of the proposed Settlement Class arose from the same course of conduct and routine practice by Whirlpool and are based on the same legal theory. *Sosa*, 73 So. 3d at 107. The commonality requirement is satisfied if the common or general interest of the class members is in the object of the action, the relief sought, or the general question implicated in the action. *See Imperial Towers Condo., Inc. v. Brown*, 338 So. 2d 1081, 1084 (Fla. 4th DCA 1976). The commonality requirement is satisfied if the questions linking the class members are substantially related to the resolution of the litigation, even if the

individuals are not identically situated. *See Morgan v. Coats*, 33 So. 3d 59, 64 (Fla. 2d DCA 2010).

Here, Plaintiff has alleged numerous questions of fact and law common to the Settlement Class, as set forth in the Complaint, filed in this Lawsuit on April 18, 2012. In this settlement context, there are common issues, since all of the class members have purchased Mixers with the identical marketing as to the asserted power ratings of the Mixers, which Plaintiff alleges to have been deceptive.

Typicality. The typicality requirement of Rule 1.220(a)(3) "refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." 1 Newberg on Class Actions § 3:13 (citations omitted; referencing Fed. R. Civ. P. 23(a)(3)). The key inquiry is whether the class representative possesses the same legal interest and has endured the same legal injury as the class members. *See Morgan*, 33 So. 3d at 65. The typicality requirement is satisfied when there is a strong similarity in the legal theories upon which those claims are based when the claims of the class representative and class members are not antagonistic to one another. *Id.* The typicality requirement may be satisfied despite substantial factual differences. *Id.* In this case, the claims of Plaintiff and Settlement Class Members are based on the same legal theory, in that they all arise from the purchase of a Mixer as a result of the Defendant's allegedly deceptive marketing.

Adequacy of Representation. Rule 1.220(a)(4) requires that "the representative party can fairly and adequately protect and represent the interests of each member of the class.". There are two prongs to be satisfied: (1) the first prong concerns the qualifications, experience and ability of class counsel to conduct the litigation; and (2) the second prong pertains to whether the class representative's interests are antagonistic to the interests of the class members. *See City of*

Tampa v. Addison, 979 So. 2d 246, 255 (Fla. 2d DCA 2007). The proposed class representative, Bornstein fairly and adequately represents the interests of the proposed Settlement Class and has no claims that are antagonistic of members of the Settlement Class. In addition, Class Counsel are experienced in class action litigation as demonstrated by the accompanying Firm Resumes of Class Counsel.

Predominance. For purposes of satisfying Rule 1.220(b)(3)'s requirements, the class members' common questions of law and fact must predominate over individual class member claims. *See* Fla. R. Civ. P. 1.220(b)(3); *see also InPhynet Contracting Servs., Inc. v. Soria*, 33 So. 3d 766, 771 (Fla. 4th DCA 2010). The class representative must only demonstrate that some questions are common, and that they predominate over individual questions. *See Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1170 (11th Cir. 2010).

In this case, common questions of fact and law predominate over questions of fact and law affecting only individual members of the Settlement Class.

Superiority. Rule 1.220(b)(3) also requires that the class action device be superior to other methods of adjudication. Factors the Court may consider are: (A) the interests of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class. *See Morgan*, 33 So. 3d 66. As noted earlier, any difficulties of management of the class need not be considered in this settlement context. See *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 302-03 (3d Cir. 2011) (holding that potential variances in different

states' laws would not defeat certification of a settlement-only class because trial management concerns were not implicated by a settlement-only class ,as opposed to a litigated class). A class action settlement is obviously superior to individual litigation, as it resolves issues susceptible to serial litigation by multiple plaintiffs fairly and uniformly, and without the need for protracted litigation and the possibility of inconsistent results. *See Sosa*, 73 So. 3d at 116 (Because of the large number of potential class members who based their claims on the same common course of conduct, a class action would be a more manageable and more efficient use of judicial resources than individual claims).

D. Form and Method of Class Notice Are Adequate and Satisfy the Requirements of Rule 1.220.

Under Rule 1.220(e) of the Florida Rules of Civil Procedure, when approving a class action settlement, notice of the proposed settlement "shall be given to all members of the class as the court directs."

To that end, the Proposed Order Granting Preliminary Approval, attached as Exhibit 2, spells out the details of the Parties' notice plan, and provides that notice to members of the Settlement Class will be made by either by e-mail or postal mail, where either such address is known and readily available. Based upon the customer records Whirlpool maintains in its own databases, and the records Whirlpool has obtained from its top-volume trade customers of the Mixers, the Parties estimate that 75-80% of the proposed class will receive direct, individual notice of the Settlement. In order to reach additional purchasers, the Settlement further provides that notice of the Settlement will be published on an informational website to be maintained by the settlement administrator selected by Whirlpool, with links from the KitchenAid website. The Parties expect that these components will place the "reach" of class notice well within the

"norm" of "70-95%" identified by the Federal Judicial Center as meeting due process requirements. *See* Class Action Pocket Guide at 27 (3d ed. 2010).[3]

The forms of the notice are attached as Exhibits A and B to the Proposed Order. Both forms of the notice are written in plain and straightforward language consistent with the spirit of Rule 1.220(e). Both forms of notice objectively and neutrally apprise the Settlement Class Members of the nature of the action, the definition of the class sought to be certified for purposes of the Settlement, the class claims and issues, that Settlement Class Members may enter an appearance before the Court at the Fairness Hearing, that the Court will exclude from the Settlement Class any Person who opts out (and sets for the procedures and deadlines for doing so), and the binding effect of a class judgment on Settlement Class Members under Rule 1.220. Both forms of notice also apprise Settlement Class Members of the procedures and deadlines for submitting objections. Whirlpool, through its Settlement Administrator, KCC LLC, will establish a website that Settlement Class Members can visit to review the Settlement Notice and to obtain additional information regarding the Settlement.

The Court will decide whether to grant final approval to the Settlement Agreement after notice is sent to all members of the Settlement Class whose addresses reasonably can be identified in Whirlpool's records of purchasers and owners of the Mixers, after they have been given the opportunity to object or opt out, and after this Court hears final arguments at a fairness hearing pursuant to the provisions of the attached proposed order. The Settlement Administrator, KCC LLC, will administer notice to the Settlement Class pursuant to the plan set forth in the Proposed Order.

[3] http://www.fjc.gov/public/pdf.nsf/lookup/ClassGd3.pdf/$file/ClassGd3.pdf (last visited May 2, 2014).

E. Conclusion

For the foregoing reasons, Plaintiff seeks preliminary approval of the Settlement Agreement and entry of the attached order, and to grant such other and further relief as this Court deems necessary and proper for the effective administration of this class action.

Counsel for Plaintiff and the Settlement Class:

By: s/ Jon Herskowitz
Jon Herskowitz
Fl. Bar No. 814032
BARON & HERSKOWITZ
9100 S. Dadeland Blvd.
Suite 1704
Miami, FL 33156
Telephone: (305) 670-0101
Facsimile: (305) 670-2393

Sanford P. Dumain
MILBERG LLP
One Pennsylvania Plaza
New York, NY 10018
Telephone: (212) 594-5300
Facsimile: (212) 868-1229

Robert I. Lax
LAX LLP
380 Lexington Ave.
31st Floor
New York, NY 10168
Telephone: (212) 818-9150
Facsimile: (212) 818-1266

Counsel for Defendant Whirlpool Corporation

By: s/ Charles P. Flick
Charles P. Flick, Esq. (FBN: 253324
Shawn Y. Libman, Esq. (FBN: 10544)
SEIPP & FLICK, LLP
Two Alhambra Plaza, Suite 800
Miami, Florida 33134
Telephone: 303.995.5600
Facsimile: 303.995.6100

Andrew M. Unthank (CO #36832) (*pro hac vice)*
WHEELER TRIGG O'DONNELL LLP
370 17th Street, Suite 4500
Denver, Colorado 80202
Telephone: 303.244.1800
Facsimile: 303.244.1879
E-mail: unthank@wtotrial.com

Sean D. Baker (CO #25949) *(pro hac vice)*
CRUX LEGAL LLC
1899 Wynkoop Street, Suite 225
Denver, Colorado 80202
Telephone: 303.618.3584
E-mail: baker@cruxlegal.com